Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

MICHAEL C. RENNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN H. BISBEE*
LAW OFFICES OF JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does *Hudson v. United States*, 522 U.S. 93 (1997), holding that OCC banking debarment orders under 12 U.S.C. §1818(e), enforceable by civil monetary penalties pursuant to 12 U.S.C. §1818(i), foreclose a collateral order, double jeopardy appeal under *Abney v. United States*, 431 U.S. 651 (1977), for acts resulting in a prior FDIC banking debarment order under 12 U.S.C. §1818(e), but equivalent to a criminal sentence of probation as specifically enforceable by the imprisonment and fines prescribed in 12 U.S.C. §1818(j), for violation of the order of debarment?

PARTIES IN THE COURT BELOW

The Petitioner in the appeal below was Michael Renner, Defendant-Appellant, and the Respondent in the court below was the Plaintiff-Appellee, United States of America.

RULE 29.1 STATEMENT

There are no corporations involved, and, therefore, no subsidiary corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael C. Renner respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit dismissing Petitioner's appeal "as frivolous on the authority of *Hudson v. United States*, 118 S.Ct. 488 (1997)". (App. A, *infra)* 1a.

OPINIONS BELOW

The order of the court of appeals, entered February 23, 1999, App. 1a, is not reported. The opinion of the district court action, No. 98-CR-10021 (Mihm, J.) (App. B, *infra*) 2a-12a, is not reported.

JURISDICTION

This Petition for Certiorari is being brought within 90 days of the court of appeals' order dismissing Petitioner's appeal. Petitioner invokes this court's jurisdiction under and pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

A. Amendment V, United States Constitution provides:

> "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb. . . . "

B. 12 U.S.C. §1818(e) provides:

"**(e) Removal and prohibition authority**

(1) Authority to issue order. Whenever the appropriate Federal banking agency determines that –

(A) any institution-affiliated party has, directly or indirectly –

(i) violated –

(I) any law or regulation;

(II) any cease-and-desist order which has become final;

(III) any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or

(IV) any written agreement between such depository institution and such agency;

(ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution; or

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A) –

(i) such insured depository institution or business institution has suffered or

will probably suffer financial loss or other damage;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice or breach; and

(C) such violation, practice, or breach –

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,

the agency may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution."

C. 12 U.S.C. §1818(i) provides:

"(i) Jurisdiction and enforcement; civil money penalty

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance

herewith; but except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order

. . .

[Statute then prescribes categories of civil fines and monetary penalties]."

D. 12 U.S.C. §1818(j) provides:

"(j) Criminal Penalty

Whoever, being subject to an order in effect under subsection (e) or (g) of this section, without prior written approval of the appropriate federal institution's regulatory agency, knowingly participates, directly or indirectly, in any manner (including by engaging in an activity specifically prohibited in such an order of subsection (e)(6) of this section) in the conduct of the affairs . . . shall be fined not more than $1,000,000.00, imprisoned for not more than 5 years, or both."

E. 18 U.S.C. §1344 provides:

"Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

> shall be fined not more than $1,000,000.00 or imprisoned not more than 30 years, or both."

STATEMENT OF THE CASE

Petitioner, a 17 year employee of the Community Bank of Greater Peoria, Illinois (CBGP), and, by April, 1993, Senior Vice President, entered into a "Stipulation and Consent" on July 12, 1994, authorizing the FDIC to bar him from participation in any aspect of what had been his banking career. (App. C, *infra*) 13a-15a. In his stipulation, Petitioner agreed, should the FDIC accept the stipulation, Petitioner would be, "subject . . . to the penalties set forth under . . . 12 U.S.C. §1818(j)". *Id.*, at 14a. On October 4, 1994, the FDIC entered an order entitled, "Order of Prohibition from Further Participation", (App. D, *infra*) 16a-19a, prohibiting Petitioner from further participation in banking. Petitioner was not subjected to any monetary penalties.

In its letter of transmittal, (App. E, *infra*) 20a-21a, to Petitioner enclosing the "Order of Prohibition from Further Participation", the FDIC advised Petitioner that the FDIC had, on October 24, 1994,

> "adopted and approved the Stipulation and Consent to the issuance of an order from further participation . . . which you entered into on July 12, 1994, with a representative of the FDIC."

The FDIC further advised Petitioner in the second paragraph of its letter of transmittal that his, "stipulation was accepted and the order of prohibition was entered pursuant to . . . 12 U.S.C. §1818(e) (1982) and . . . 12 U.S.C.

§1818(j) (1989)." App. 20a. The FDIC then admonished Petitioner respecting the criminal punishments specified in 12 U.S.C. §1818(j) in the language of the statute itself, set forth, *supra. Id.*, at 21a.

On March 18, 1998, followed by a superseding indictment returned May 7, 1998, Petitioner was charged in 12 counts with violating 18 U.S.C. §1344. The 12 count indictment charged Petitioner with the same conduct which had formed the basis of the FDIC's institution of the proceedings resulting in the "Stipulation and Consent", which he entered with the FDIC pursuant to 12 U.S.C. §1818(e) and §1818(j), resulting in the order debarring him from banking specifically enforceable by the criminal punishments prescribed in 12 U.S.C. §1818(j).

Petitioner moved to dismiss the superseding indictment on grounds of prior jeopardy in the form of the punishment imposed by the order debarring him from banking specifically enforceable as to him by the criminal punishments of 12 U.S.C. §1818(j). Petitioner testified at the hearing on his motion to dismiss that he understood his entry into the stipulation consenting to the order debarring him from banking and specifically, as to him, subject to the criminal punishments prescribed in 12 U.S.C. §1818(j), as precluding prosecution unless he engaged in acts prohibited by the FDIC's order of prohibition. (App. F, *infra*) 22a-31a.

On September 24, 1998, the district court delivered an oral opinion, App. 2a-12a, denying Petitioner's motion. From that order, Petitioner filed, on October 5, 1998, his Notice of Appeal pursuant to the collateral order doctrine, as allowed by this Court in *Abney v. United*

States, 431 U.S. 651 (1977), and *Richardson v. United States*, 468 U.S. 317, 322 (1984). Thereafter, on October 22, 1998, the government moved to dismiss the appeal, to which motion Petitioner responded on November 13, 1998. On February 23, 1999, the court of appeals dismissed the appeal, "as frivolous" on the authority of *Hudson v. United States*, 522 U.S. 93, 139 L.Ed.2d 450 (1997). App. 1a.

REASONS FOR GRANTING THE WRIT

A.

This Case Presents an Important, Unresolved Question, Certain to Recur, Respecting the Continued Viability of Collateral Order Appeals Under *Abney v. United States*, 431 U.S. 651 (1977), From Orders Refusing to Dismiss a Federal Criminal Prosecution on Grounds of Former Jeopardy Created by Prior Orders of Occupational Debarment Equivalent to Criminal Probation as Specifically Enforceable by Five Years Imprisonment and a $1,000,000.00 Fine for Violation of Orders of Debarment

1.

Collateral Order Appeals Under *Abney* Protect the Right Against Being Subjected to a Second Criminal Punishment for the Same Offense

The Fifth Amendment states in relevant part that, "no person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause protects against three distinct violations: First, "a second prosecution for the same offense after acquittal"; second, "a second prosecution for the same

offense after conviction"; and, third, "multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), overruled on other grounds, *Alabama v. Smith*, 490 U.S. 794 (1989). This Court in *Hudson v. United States, supra*, 139 L.Ed.2d at 458, stressed the last of the three purposes of the double jeopardy prohibition, the Chief Justice saying for the Court, "the clause protects only against the imposition of multiple criminal punishments for the same offense . . . occur[ring] in successive proceedings."

The prohibition against multiple criminal punishments for the same offense includes, "an attempt to secure . . . punishment in more than one [proceeding]. . . . ". *Witte v. United States*, 515 U.S. 389, 397 (1995). Any such attempt, "is [an] appropriate subject[ ] for interlocutory appeal" under the collateral order doctrine applicable to denial of double jeopardy motions under *Abney v. United States, supra*, and *Richardson v. United States, supra. United States v. Andrews*, 146 F.3d 933, 937 (D.C. Cir. 1998).

The test established by this Court in *Richardson, supra*, requires a "colorable" claim sufficient to confer interlocutory jurisdiction in the court of appeals under *Abney*. The test, "is a lenient one". *United States v. Andrews, supra*, 146 F.3d at 937. Exemplifying the lenient nature of the standard, the court which decided *Andrews, supra*, 146 F.3d at 937, six months after *Hudson, supra*, noted the means employed by this Court in *Abney* itself. In *Abney*, this Court,

> "found jurisdiction to hear the defendant's interlocutory appeal [but] disposed of defendant's argument on the merits in a single paragraph."

Andrews, supra, 146 F.3d at 937, citing *Abney, supra,* 431 U.S. at 664-665.

2.

The Order of Debarment Enforceable as to Petitioner Under 12 U.S.C. §1818(j) Placed Him on the Equivalent of Criminal Probation Under 18 U.S.C. §3563(b)(5), Revocable Under 18 U.S.C. §3565

As this Court noted in *Roberts v. United States,* 320 U.S. 264, 272 (1943), probation is,

> "an instrument . . . to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for the original offense in the event that he did abuse this opportunity."

By prescribing in 18 U.S.C. §3563(b) discretionary conditions of probation, Congress has empowered courts, pursuant to §3563(b)(5), to bar,

> "an individual from engaging in a specified occupation, business or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in a specified occupation, business or profession to a stated degree or under certain circumstances. . . . ".

The Seventh Circuit, in dismissing Petitioner's appeal as "frivolous", overlooked the "lenient" standard of *Abney. Andrews, supra.* It overlooked that notwithstanding that an order of debarment, standing alone, is civil, it acquires a qualitatively different character when specifically enforceable by the criminal punishments of incarceration and payment of a $1,000,000.00 fine. Thus, the court below overlooked that as the order debarring Petitioner from banking was specifically enforceable by the criminal punishments of 12 U.S.C. §1818(j), it, in effect, placed him on criminal probation, no different from that prescribed for those convicted of federal crimes and sentenced pursuant to 18 U.S.C. §§3561-3564.

By dismissing Petitioner's appeal "as frivolous", the court of appeals has, in a one sentence order, nullified in the Seventh Circuit the continued viability of collateral order appeals under *Abney v. United States, supra.* The Seventh Circuit has overlooked that the FDIC's debarment of Petitioner from what had been for 17 years prior to October, 1994, his sole occupational pursuit, was issued in tandem with the FDIC's specific admonition that he stood subject to the pains and punishments under 12 U.S.C. §1818(j) if he violated the debarment order, altogether without reference to any monetary penalty. The Seventh Circuit has overlooked that the FDIC's debarment of Petitioner from banking for the rest of his life, enforceable under the criminal punishments specified in 12 U.S.C. §1818(j), was the same as a specific discretionary condition imposed by a sentencing court as

part of a criminal defendant's sentence to probation under 18 U.S.C. §3563(b)(5).

The Seventh Circuit has thus overlooked that Petitioner stands in the same position as a criminal probationer subject to revocation under 18 U.S.C. §3565. It has overlooked that were Petitioner to violate the conditions of his debarment, the FDIC admonished it would ask a district court to subject him to the same pains and punishments under 12 U.S.C. §1818(j) as a U.S. Attorney would ask a district court to subject a federal probationer vulnerable to a revocation of probation under 18 U.S.C. §3565.

In so overlooking the foregoing points, the Seventh Circuit has permitted the government to now press the district court, under the guise of 18 U.S.C. §1344, to impose what are tantamount to the pains and punishments of 12 U.S.C. §1818(j) without Petitioner having violated the FDIC's order debarring him from banking. By so doing, the Seventh Circuit has disregarded that the FDIC's order debarring Petitioner from banking subject to 12 U.S.C. §1818(j) satisfied all the criteria prescribed by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963); *United States v. Ward*, 448 U.S. 242, 248-249 (1980), and incorporated in *Hudson, supra*, 139 L.Ed.2d at 458-459, as creating a prior criminal jeopardy.

Therefore, Petitioner, similar to a federal criminal probationer, stands subject to the punishments under 18 U.S.C. §1344 for acts resulting in his debarment from banking enforceable by the pains and punishments prescribed in 12 U.S.C. §1818(j). He so stands notwithstanding that he has not been charged with violating the order

of debarment under 12 U.S.C. §1818(e) so as to authorize invocation of proceedings subjecting him to the imposition of the criminal punishments under 12 U.S.C. §1818(j).

Therefore, Petitioner has presented a "colorable" claim of prior jeopardy under *Richardson, supra.* The Seventh Circuit in dismissing as "frivolous" Petitioner's appeal has nullified colorable collateral order appeals under *Abney, supra,* and subjected Petitioner to multiple criminal punishments in successive proceedings. *Hudson, supra.*

B.

This Case Presents an Important Question Neither Addressed Nor Resolved by *Hudson v. United States, supra,* the Former Criminal Jeopardy Effect of an FDIC Order of Occupational Debarment Pursuant to 12 U.S.C. §1818(e) Specifically Enforceable Pursuant to the Criminal Punishments Prescribed in 12 U.S.C. §1818(j)

In *Hudson,* this Court held that a prior debarment from banking imposed by the Office of the Comptroller of the Currency (OCC) together with civil monetary penalties did not constitute a prior punishment or jeopardy barring a subsequent prosecution for misapplication of bank funds. It appears, although it is not explicit, that the defendants in *Hudson* were barred from banking pursuant to the same statute pursuant to which Petitioner was barred, 12 U.S.C. §1818(e).[1] The various lower court opinions leading to this Court's decision in *Hudson, supra,*

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[1] It its opinion in *Hudson,* the Court noted that petitioners had violated 12 U.S.C. §§84(a)(1) and 375b and 12 CFR §§31.2(b) and 215.4(b). By reason of those violations, the OCC, pursuant to 12 U.S.C. §§93(b)(2) and 504(b), assessed monetary penalties

United States v. Hudson, 879 F.Supp. 1113 (W.D. Oklahoma 1994), dismissing the indictment on remand from the Tenth Circuit's first decision in *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994), and the Tenth Circuit's later decision in *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996), reversing the district court's dismissal of the indictment, however, made clear that the debarment orders were effected pursuant to 12 U.S.C. §1818(e). That is the end of the similarity between *Hudson, supra,* and this case.

Nowhere does this Court in *Hudson* mention 12 U.S.C. §1818(j) as the enforcement mechanism for the OCC order entered upon a stipulation and consent barring the defendants from banking. The lower court opinions in *Hudson* do not discuss the 12 U.S.C. §1818(e) debarments as enforceable by the criminal punishments specified in 12 U.S.C. §1818(j). Instead, the Tenth Circuit, in its final decision, *United States v. Hudson, supra,* 92 F.3d at 1028, observed that the *Hudson* defendants had been debarred pursuant to the OCC's civil enforcement powers under 12 U.S.C. §§93(b)(2) and 504(b) and, ultimately, pursuant to 12 U.S.C. §1818(e) and (i), the former designed, "to protect integrity in the banking system which promotes a remedial goal".

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and issued a "Notice of Intention to Prohibit Further Participation". Although the opinion does not specifically say so, the authority for the OCC to issue the "Notice of Intention to Prohibit Further Participation" is conferred by 12 U.S.C. §1818(e), as reflected in the lower court opinions in *Hudson*, discussed in greater detail, *infra*.

But, the supporting record in *Hudson* demonstrates its inapplicability to this case. (Apps. G-H, *infra*), 32a-51a. That record consists of three "Notices of Intent to Prohibit Further Participation [in banking]" and three "Stipulation and Consent Order[s]", all directed to three different defendants.

The only reference to 12 U.S.C. §1818(j) occurs in Article II(4) of the various "Stipulation and Consent Order[s]" executed by the various defendants in *Hudson, supra.* App. 49a. That paragraph reads in full:

> "This Article of this 'Stipulation and Consent Order' shall be enforceable to the same extent and in the same manner as an effective and outstanding order *that has been issued and become final* pursuant to 12 U.S.C. §1818(e), (i), (j), and (k) (as amended)."

(Emphasis supplied). Thus, reference to 12 U.S.C. §1818(j) appears as part of the clause beginning with, "that", as an article or pronoun. Webster's New Unabridged Dictionary, p. 1965 (1996). Therefore, the reference to 12 U.S.C. §1818(j) in the *Hudson* consent orders is to an order separate and apart from but analogous to the order pursuant to which the *Hudson* defendants had been debarred under 12 U.S.C. §1818(e) and enforceable under 12 U.S.C. §1818(i). But, the difference between *Hudson* and the case at bar is more profound.

The inapplicability of 1818(j) to the 1818(e) debarment orders in *Hudson* is emphasized by the notices sent to the *Hudson* defendants. App. 33a-44a. The notices specify in the third recital paragraph that the Comptroller intended,

> "to prohibit [the various defendants in *Hudson*] from participation, in any manner, in the conduct of the affairs of any insured depository institution, pursuant to 12 U.S.C. §1818(e) [and] (i)."

In turn, 12 U.S.C. §1818(i) is specific in its title that it provides for "jurisdiction and enforcement as a *civil money penalty*". (Emphasis supplied). Not only does 12 U.S.C. §1818(i) identify in its title that it provides for only a civil money penalty, the substance of the section provides for the various types of money penalties, the assessment authorities, mitigating factors, hearings, collections, and notices, etc.

Therefore, it is inescapable that the defendants in *Hudson* were put on notice that enforcement of their debarment from banking pursuant to 12 U.S.C. §1818(e) was to be effected pursuant to the civil monetary penalties authorized by 12 U.S.C. §1818(i). That fact placed the *Hudson* defendants into a legal status altogether different from that of Petitioner. The notices in *Hudson* demonstrate, like nothing else could, that the debarment orders in *Hudson* were indeed civil. To the contrary, the criminal punishments specified in 12 U.S.C. §1818(j) in the notice and letter of transmittal to Petitioner were integral to enforcing the 12 U.S.C. §1818(e) order debarring him from banking.[2]

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[2] Petitioner concedes that 12 U.S.C. §1818(j) could presumably be used as the source to prosecute the *Hudson* defendants if they violated the order of debarment. However, that does not alter the fact that nowhere in the record in *Hudson* were the defendants apprised that their violation of the debarment order in 12 U.S.C. §1818(e) would result in a criminal

C.

The Seventh Circuit's Order Dismissing Petitioner's Appeal Places the Seventh Circuit in Direct Conflict With the D.C. and the Sixth Circuits and With This Court's Precedents Respecting *Abney* Appeals

Petitioner has found 11 courts of appeals decisions have been rendered since *Hudson* which specifically construed the rule of *Hudson*.[3] In the only cases which presented the issue of whether prior regulatory proceedings resulting in debarment from a profession, fines, penalties, etc., constituted prior punishments, *United States v. Beaty*, 147 F.3d 522 (6th Cir. 1998), and *United States v. Andrews*, *supra*, the courts permitted interlocutory appeals. No case Petitioner has found which examined the application of *Hudson* indicated that an interlocutory appeal filed after *Hudson* invoking the question of whether prior regulatory proceedings resulting in debarment from a profession, fines, penalties, etc., did not satisfy the *Richardson*, *supra*, "colorable" double jeopardy claim.

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prosecution. However, the FDIC not only advised Petitioner of that fact, it directly admonished him respecting it.

[3] *S.E.C. v. Palmisano*, 135 F.3d 860, 864 (2nd Cir. 1998); *U.S. v. Beaty*, 147 F.3d 522, 524 (6th Cir. 1998); *U.S. v. Newman*, 144 F.3d 531, 540 (7th Cir. 1998); *S.A. Healy Co. v. Occupational Safety and Health Review Commission*, 138 F.3d 686, 687 (7th Cir. 1998); *Cox v. Commodity Futures Trading Commission*, 138 F.3d 268, 270 (7th Cir. 1998); *LaCrosse v. Commodity Futures Trading Commission*, 137 F.3d 925, 927 (7th Cir. 1998); *U.S. v. Lippert*, 148 F.3d 974, 976 (8th Cir. 1998); *United States v. Mayes*, 1998 WL 754557 (11th Cir., Oct. 29, 1998); *Grossfeld v. Commodity Futures Trading Commission*, 137 F.3d 1300, 1302 (11th Cir. 1998); *Cole v. U.S. Dept. of Agriculture, A.S.C.S.*, 133 F.3d 803, 805 (11th Cir. 1998); and, *U.S. v. Andrews*, *supra*.

Moreover, none of the cases involved civil debarment orders specifically enforceable by the explicitly criminal punishment provisions of such as 12 U.S.C. §1818(j). Therefore, the Seventh Circuit has, Petitioner respectfully submits, overlooked the criminal nature of Petitioner's debarment from banking under circumstances analogous to criminal probation under 18 U.S.C. §3563(b)(5). It has thereby placed itself in direct conflict with the Sixth and D.C. Circuits. It has, moreover, placed itself in direct conflict with this Court's precedent in *Richardson, supra,* permitting a collateral order appeal respecting a "colorable" claim of double jeopardy.

D.

The Seventh Circuit's Order Dismissing the Appeal Marks a Fundamental Departure From Previously Established Law and Presents an Important, Clear Cut Issue of Law Fundamental to the Further Conduct of the Case on a Matter Critical to the Administration of Federal Criminal Justice

Petitioner, in light of the court of appeals order, faces trial under circumstances where he has presented a colorable claim of prior jeopardy. *Richardson v. United States, supra.* As such, the Seventh Circuit's order warrants review by this Court, notwithstanding that it is from an interlocutory order of the district court. That order subjects Petitioner to forfeiture of the fundamental constitutional immunity from being twice criminally punished for the same offense in successive proceedings. *Hudson, supra; Abney v. United States, supra; Stack v. Boyle,* 342 U.S. 1 (1951). See also, *United States v. General Motors Corp.,* 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel*

Corp., 379 U.S. 148, 153 (1964); *Michael v. United States*, 454 U.S. 950, 951-952 (1981) (White, J., dissenting from denial of certiorari in a case where criminal trial was to follow denial of motion to suppress).

This Court has previously authorized review in cases such as this one in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949), and *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947), where the courts of appeals had reversed the granting of motions to dismiss and ordered the cases remanded for trial. This case is more compelling than *Land, supra; Larson, supra;* or *Stack v. Boyle, supra.* It presents a problem critical to the administration of criminal justice and the preservation of the Fifth Amendment immunity from being twice placed in criminal jeopardy of life and limb for the same offense in successive proceedings. *Hudson, supra.* The circumstances presented in this case are certain to recur unless this court reviews the order below and offers guidance on the issue presented in this Petition. *DiBella v. United States*, 369 U.S. 121 (1962).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

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APPENDIX A

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

February 23, 1999

Before

Hon. Frank H. Easterbrook, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. Ilana Diamond Rovner, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
No. 98-3549 v.	
MICHAEL C. RENNER, Defendant-Appellant.	No. 98 CR 10021
	Michael M. Mihm, Judge.

ORDER

On consideration of the "MOTION TO DISMISS APPEAL" filed by the United States on October 23, 1998, and the "MEMORANDUM IN RESPONSE TO GOVERNMENTS MOTION TO DISMISS APPEAL" filed by the defendant-appellant on November 16, 1998,

IT IS ORDERED that this appeal is DISMISSED as frivolous on the authority of *Hudson v. United States*, 118 S.Ct. 488 (1997).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	Criminal No. 98-10021
	)	Peoria, Illinois
Plaintiff,	)	September 24, 1998
	)	
vs.	)	
	)	
MICHAEL C. RENNER,	)	
	)	
Defendant.	)	

HEARING ON PENDING MOTIONS

BEFORE:

HONORABLE MICHAEL M. MIHM
Chief United States District Judge

APPEARANCES:

BRADLEY W. MURPHY, ESQ.
GERARD BROST, ESQ.
Assistant United States Attorneys
216 Federal Building
Peoria, Illinois 61602
(Appeared on Behalf of the Government)

JOHN H. BISBEE, ESQ.
437 N. Lafayette Street
Macomb, Illinois 61455
(Appeared on Behalf of the Defendant)

Karen S. Hanna, C.S.R.
U.S. District Court Reporter
Central District of Illinois

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[p. 30]1818(j), rather the mechanism of enforcement was purely money.

THE COURT: All right. Well, the Court's ruling or this is that the double jeopardy argument is without merit. I want to comment briefly, first of all, on the testimony of the defendant. When I was listening to his testimony, for a minute I though this was somehow a reconsideration of the Court's earlier ruling on whether or not the Government was barred from bringing the prosecution at all because of some agreement that he would not [sic] prosecuted. As I understand it, that's not really the context in which it was offered, but I'm not going to revisit that decision.

In my view, I don't believe that Mr. Renner's testimony, with all due respect to him and his attorney, is relevant to the issue of whether or not the debarment was a criminal punishment. I want to try to make a fairly complete record on this point now concerning this ruling.

On October 24 of 1994, the FDIC issued an order of prohibition from further participation by the defendant and it became effective ten days after its issuance. According to the terms of the order, Mr. Renner was to be prohibited from participating in any matter in the conduct of any affairs of any financial institution; (b) soliciting, procuring, transferring, etcetera, consent authorizations with respect to voting rights in any financial institution; [p. 31] (c) violating any voting agreement previously approved by the appropriate federal banking agency; and (d) voting for a director or serving or acting

as an institution-affiliated party. And the debarment was pursuant to 12 U.S.C. 1818(e)(7).

Mr. Bisbee mentioned the case of the United States vs. Stoller. That case is somewhat instructive. It's found at 78 Fed. 3rd 710. That is a First Circuit case from 1996.

In that case the Court of Appeals faced, I believe, the same issue rise [sic] raised by Mr. Renner in his motion to dismiss. In that case the FDIC instituted debarment proceedings against the defendant. The FDIC's board of directors issued a debarment order under 1818(e). Subsequent to the department proceeding, the debarment proceeding, the Government brought a criminal action against the defendant under various federal statutes. And that discussion is found at pages 713 and 14.

After the Court of Appeals discussed at length in that case the relevant double jeopardy jurisprudence of the Supreme Court, the Court concluded that 1818(e), quote, "on its face displays colors more consistent with the remedial end of the spectrum", unquote.

The Court of Appeals then examined the legislative history behind Section 1818(e) and concluded that Congress gave the FDIC, quote "Removal power for remedial purposes [p. 32] and the Financial Institutions Reform Recovery and Enforcement Act of 1989 does not suggest that Congress experienced a change of heart." You might also wish to look at U.S. vs. Rusk found at 96 Fed. 3rd 777, pages 778 and 79. That's a Fifth Circuit case from 1996 which reaches the same conclusion as the Stoller court.

MR. BISBEE: Excuse me, Your Honor. Could you read the cite again?

THE COURT: Yes. It's U.S vs. Rusk, 96 Fed. 35d 777 at pages 778 and 79. That reached the same conclusion as the Stoller Court. As I think perhaps Mr. Bisbee indicated, I think it is important to note that the Stoller Court used the more stringent double jeopardy standard set fourth by the Supreme Court in the case of U.S. vs. Halper found at 490 U.S. 435, the 1989 case. As I think everyone here would agree, at least to different degrees, I believe the Supreme Court has all but overruled Halper in its decision of Hudson vs. United States found at 118 Supreme Court 448 which is a 1997 case.

In addition to the Stoller case from the First Circuit and the Rusk Case from the Fifth Circuit, there is precedent from the Seventh Circuit that I believe supports the Court's conclusion that Mr. Renner's debarment does not constitute criminal jeopardy for Fifth Amendment purposes.

In the case of the United States vs. Furlett found [p. 33] at 974 Fed. 2d 839, a Seventh Circuit case from 1992, the Commodity Futures Trading Commission revoked the defendant's registration and barred him from trading on any contract market. They also assessed a $75,000.00 fine against him. Subsequent to that proceeding, the defendant was indicted for conspiracy, mail fraud, etcetera, which he challenged on double jeopardy grounds. The defendant in that case argued that the decision was punitive in nature and, therefore, constituted criminal jeopardy. The Seventh Circuit disagreed. The Court stated that: "The decision to exclude the defendant from any

contract market can be seen as an action to ensure the integrity of the markets and protect them from people like the defendant." As with the Stoller analysis, the Furlett Court's analysis was done under the framework set forth in Halper.

In the Hudson case, the Supreme Court all but overruled Halper. In the Hudson case, the Supreme Court was faced with the issue of whether parallel proceedings, one regulatory and the other criminal, which imposed punishment upon a defendant are proscribed by the double jeopardy clause's proscription against multiple punishments. The petitioners in Hudson paid a monetary assessment – notice paid, not the threat of something happening – but paid a monetary assessment to the Office of the Comptroller of the Currency for using their positions in a bank to arrange loans [p. 34] to the third persons that were in violation of various banking statutes and regulations.

I would inject here parenthetically that if I understand the situation in Hudson, if Hudson had violated the action taken by the debarment, even though there was a fine paid, that there could have been additional action taken pursuant to paragraph (j) I believe. I think that's true in any case.

Subject to paying an assessment and being debarred, the petitioners were indicted on charges of conspiracy, misapplication of bank funds and making false bank entries. The petitioners challenged the criminal case using Halper as the basis for their double jeopardy argument, but the Tenth Circuit held that the fines imposed

were not so excessive as to render them punitive. Accordingly, the Court of Appeals held there was no double jeopardy violation.

In affirming the Tenth Circuit, the Supreme Court took the opportunity to re-examine its opinion in Halper. The Court concluded that in Halper it had departed from its previous double jeopardy jurisprudence in two significant respects.

First, the Court noted that it had failed to examine the threshold issue of, quote, "whether the successive punishment at issue was a criminal punishment", unquote. Second, the Court noted that in Halper it had [p. 35] assessed the character of the sanction as opposed to evaluating – and I think this is very important – as opposed to evaluating the statute on its face to determine whether it provided for what amounted to a criminal sanction.

The Court noted that Halper's methodology of analyzing the character of the sanction as opposed to the character of the proceeding, quote, "flies in the face of the notion that the double jeopardy clause forbids the Government from even attempting a second time to punish criminally", end of quote.

Despite the Court's harsh criticism of Halper, it did not go insofar as to overrule Halper or declare the double jeopardy clause does not protect against successive punishments. The Court did, however, limit the scope of the multiple punishment aspect of the double jeopardy clause. It stated that the protection against multiple punishments for the same offense arises only when both punishments are imposed in proceedings that can be

fairly characterized as criminal in nature. Hence, the Court essentially duplicated the double jeopardy clause's well established proscription against successive criminal prosecutions for the same offense.

In Hudson, one of the statutes examined by the Court is the exact same debarment provision that Mr. Renner [p. 36] argues is criminal or punitive in nature, that is 12 U.S.C. 1818(e). The Court stated that, quote: "While the provision authorizing debarment contains no language explicitly denominating the sanction as civil, we think it is significant that the authority to issue this debarment order is conferred upon", quote, " 'appropriate federal banking agencies.' " That such authority was conferred upon administrative agencies is prima facie evidence that Congress intended to provide for a civil sanction.

I believe the position of the defendant is this case is based on a misconception that because the basis for debarment under 1818(e) is criminal conduct, that somehow this provision is criminal in nature. However, 1818(e) is clearly labeled as, quote, "removal and prohibition authority", unquote. It is an enabling provision that allows federal banking agencies to, among other things, impose an industry-wide prohibition on a person who has been removed from office and/or prohibited from participating in the affairs of an insured depository institution upon the proper showing of criminal conduct.

In the Court's opinion, this is no different from the provisions in Furlett that I have referred to earlier in the context of the Commodity Futures Trading Corporation. In Furlett, the CFTC's administrative action against the

defendant was based on the defendant violating certain [p. 37] provisions of the Commodities Exchange Act.

Additionally, the Supreme Court addressed this exact issue in Hudson. They said, quote: "The conduct for which OCC sanctions are imposed may also be criminal and in this case form the basis for petitioner's indictment. This fact is insufficient to render the money penalties and debarment sanctions criminally punitive, particularly in the double jeopardy context."

In defense counsel's brief, Mr. Bisbee addresses the point that 1818(j) is a section providing criminal penalties. That's certainly true. No question. Section 1818(j), which is entitled "Criminal Penalties", provides for a fine of not more than $1 million, imprisonment for not more than five years or both.

According to Mr. Brisbee, this statute clearly indicates that Renner was criminally punished by the FDIC when he was debarred. The Court does not accept this reasoning. The reading of the FDIC order of prohibition clearly shows the FDIC never mentioned 1818(j). The only mention of 1818(j) is in a letter from the FDIC – you're shaking your head. Are you saying it is mentioned in the prohibition letter?

MR. BISBEE: No, Your Honor. It is mentioned in the stipulation.

THE COURT: Okay. Fine. Let me finish the [p. 38] sentence then before you start shaking your head.

MR. BISBEE: I'm sorry.

THE COURT: The only mention of 1818(j) is in a letter from the FDIC to Renner and the Stipulation and

consent to the issuance of an order of prohibition. The letter stated that the order of prohibition was issued pursuant to 1818(e) and 1818(j). A reading of the order of prohibition, however, clearly shows Section (e) was the basis for the debarment. Additionally, there is no indication that Renner was ever prosecuted under 1818(j) by the FDIC. Furthermore, the types of penalties provided for in 1818(j) could only be imposed after a criminal proceeding and conviction since one of the penalties is up to five years in prison.

In the opinion of the Court then, Section 1818 of Title 12 is a comprehensive provision which includes both civil and criminal penalties. Merely because a criminal penalty is mentioned in one sub-section of 1818 does not convert the civil penalties provided for or actually imposed for therein into criminal penalties.

The reference to 1818(j) in the stipulation and consent is found in paragraph 3. Therein, the FDIC states, quote: "Any violation of the order could also subject Renner to the penalties set for the under 8(j) of the Act, 12 U.S.C. 1818(j)", end of quote.

[p. 39] In other words, according to my reading of the stipulation, if Renner violated the order that arose as a result of the stipulation and consent, then he could be prosecuted under 1818(j). There is, as I said, no indication that he as ever prosecuted. As previously stated, he certainly could not be prosecuted under 1818(j) in an administrative proceeding.

Accordingly, the Court finds that because the provision under which Mr. Renner was debarred, that is 1818(e), is civil and remedial on its face, only the clearest

proof will override the legislative intent and transform this civil penalty into a criminal penalty. The clearest proof was not provided in Hudson. The clearest proof has not been provided here. There is no reason to believe in my opinion that the statute is criminal in nature. So the motion to dismiss on the basis of double jeopardy is denied.

MR. BISBEE: Your Honor, excuse me, I don't mean to interrupt, but since I'm going to have to reproduce your well-stated, well-reasoned and eloquent opinion, I would like to make one exception to it if I may, that characterization of my argument as saying that 1818(e) was criminal. I do not believe that it is. I agree fully with the Court that 1818(e) is remedial in nature in its language and has been construed to be. My argument of the criminal aspect was simply it was enforced pursuant to 1818(j).

[p. 40] THE COURT: Then to make it also clear, I would state that it is my opinion that 1818(j) is not what was utilized and, therefore, double jeopardy is not implicated.

MR. BISBEE: Thank you.

THE COURT: As to the question of whether or not the Court would go insofar as to state that the motion is frivolous, I guess it's a matter of degree. I do not believe in any way that this is anywhere near a close question. I'm not sure that's exactly the same thing as saying that it's frivolous. I think as much as I can say is that I don't believe that it's a close question at all.

MR. BISBEE: Your Honor, would you – could I inquire of the Court, would you recognize that Stoller and all the other cases that you have cited, none of them construes the enforcement of 1818(e) by 1818(j) specifically directed at the victim or the subject of the debarment order? No other case involves that and –

THE COURT: Well, I understand that, but I think your attempt to draw 1818(j) into what happened here is a valiant effort, but it doesn't come close to succeeding.

MR. BISBEE: Well, I like that adjective better than some of the others, but I only took the FDIC at its work, so if the Court could recognize this is a case of first impression and I think, therefore, of some importance and I think –

* * *

APPENDIX C

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

In the Matter of MICHAEL C. RENNER, individually, and as an institution-affiliated party of COMMUNITY BANK OF GREATER PEORIA EAST PEORIA, ILLINOIS now a branch of Magna Bank of Illinois Belleville, Illinois (Insured State Nonmember Bank)	STIPULATION AND CONSENT TO THE ISSUANCE OF AN ORDER OF PROHIBITION FROM FURTHER PARTICIPATION FDIC-94-126e

Subject to the acceptance of this STIPULATION AND CONSENT TO ISSUANCE OF AN ORDER OF PROHIBITION FROM FURTHER PARTICIPATION ("CONSENT AGREEMENT") by the Federal Deposit Insurance Corporation ("FDIC"), it is hereby stipulated and agreed by and between a representative of the Legal Division of the FDIC and Michael C. Renner ("Respondent") as follows:

1. The Respondent has been advised of the right to receive a NOTICE OF INTENTION TO PROHIBIT FROM FURTHER PARTICIPATION ("NOTICE") detailing the violations, unsafe or unsound banking practices, and/or

breaches of fiduciary duty for which an ORDER OF PROHIBITION FROM FURTHER PARTICIPATION ("ORDER") may issue. Respondent has been further advised of the right to a hearing on the charges under section 8(e) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1818(e), and the FDIC Rules of Practice and Procedure, 12 C.F.R. Part 308.

2. The Respondent, solely for the purpose of this proceeding, and without admitting or denying any violations, unsafe or unsound banking practices, and/or breaches of fiduciary duty, hereby consents to the issuance of an ORDER by the FDIC.

3. The Respondent further stipulates and agrees that such ORDER shall become effective ten (10) days after its issuance by the FDIC. Thereafter, subject only to the conditions set forth in paragraph 4 of this CONSENT AGREEMENT, the ORDER shall be fully enforceable pursuant to the provisions of section 8(i) of the Act, 12 U.S.C. § 1818(i). Any violation of the ORDER could also subject the Respondent to the penalties set forth under section 8(j) of the Act, 12 U.S.C. § 1818(j).

4. In the event the FDIC accepts this CONSENT AGREEMENT and issues the ORDER, it is agreed that no action will be taken by the FDIC to enforce said ORDER unless the FDIC has reason to believe that the Respondent has violated or is about to violate any provision of the ORDER.

5. In the event the FDIC accepts this CONSENT AGREEMENT and issues the ORDER, Respondent hereby waives:

(a) The receipt of a NOTICE;

(b) All defenses to the allegations to be set forth in the NOTICE;

(c) A hearing conducted for the purpose of taking evidence on the allegations to be set forth in the NOTICE;

(d) The filing of Proposed Findings of Fact and Conclusions of Law;

(e) The issuance of a Recommended Decision by an Administrative Law Judge in this matter; and

(f) The filing of exceptions and briefs with respect to such Recommended Decision.

Dated this 12th day of July, 1994.

FEDERAL DEPOSIT INSURANCE CORPORATION
LEGAL DIVISION

By: /s/ Donna K. Meredith
Donna K. Meredith
Deputy Regional Counsel

RESPONDENT

/s/ Michael C. Renner
Michael C. Renner

APPENDIX D

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D. C.

In the Matter of MICHAEL C. RENNER, individually, and as an institution-affiliated party of COMMUNITY BANK OF GREATER PEORIA EAST PEORIA, ILLINOIS now a branch of Magna Bank of Illinois Belleville, Illinois (Insured State Nonmember Bank)	ORDER OF PROHIBITION FROM FURTHER PARTICIPATION FDIC-94-126e

Michael C. Renner ("Respondent") has been advised of the right to receive a NOTICE OF INTENTION TO PROHIBIT FROM FURTHER PARTICIPATION ("NOTICE") issued by the Federal Deposit Insurance Corporation ("FDIC") detailing the violations, unsafe or unsound banking practices, and/or breaches of fiduciary duty for which an ORDER OF PROHIBITION FROM FURTHER PARTICIPATION ("ORDER") may issue, and has been further advised of the right to a hearing on the charges under section 8(e) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1818(e), and the FDIC Rules of Practice and Procedure, 12 C.F.R. Part 308. Having

waived those rights, the Respondent entered into a STIPULATION AND CONSENT TO THE ISSUANCE OF AN ORDER OF PROHIBITION FROM FURTHER PARTICIPATION (CONSENT AGREEMENT") with a representative of the Legal Division of the FDIC, whereby solely for the purpose of this proceeding and without admitting or denying any violations, unsafe or unsound banking practices, and/or any breaches of fiduciary duty, Respondent consented to the issuance of an ORDER by the FDIC.

The FDIC considered the matter and determined it had reason to believe that:

(a) The Respondent has engaged or participated in violations, unsafe or unsound banking practices, and/or breaches of fiduciary duty as an institution-affiliated party of the Community Bank of Greater Peoria, East Peoria, Illinois, now a branch of Magna Bank of Illinois, Belleville, Illinois ("Bank");

(b) By reason of such violations, practices and/or breaches of fiduciary duty, the Bank has suffered or will probably suffer financial loss or other damage, the interests of the Bank's depositors have been or could be prejudiced and/or Respondent received financial gain or other benefit; and

(c) Such violations, practices and/or breaches of fiduciary duty involve personal dishonesty on the part of the Respondent or demonstrate the Respondent's willful and/or continuing disregard for the safety or soundness of the Bank.

The FDIC further determined that such violations, practices and/or breaches of fiduciary duty demonstrate

the Respondent's unfitness to serve as a director, officer, person participating in the conduct of the affairs or as an institution-affiliated party of the Bank, any other insured depository institution, or any other agency or organization enumerated in section 8(e)(7)(A) of the Act, 12 U.S.C. § 1818(e)(7)(A).

The FDIC, therefore, accepted the CONSENT AGREEMENT and issued the following:

ORDER OF PROHIBITION FROM FURTHER PARTICIPATION

1. Michael C. Renner is hereby, without the prior written approval of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the Act, 12 U.S.C. § 1818(e)(7)(D), prohibited from:

(a) participating in any manner in the conduct of the affairs of any financial institution or organization enumerated in section 8(e)(7)(A) of the Act, 12 U.S.C. § 1818(e)(7)(A);[1]

(b) soliciting, procuring, transferring, attempting to transfer, voting, or attempting to vote any proxy, consent or authorization with respect to any voting rights in any financial institution enumerated in section 8(e)(7)(A) of the Act, 12 U.S.C. § 1818(e)(7)(A);

(c) violating any voting agreement previously approved by the appropriate Federal banking agency; or

---

[1] Subsection (b)(8), as referenced in section 8(e)(7)(A)(ii), has been redesignated as subsection (b)(9).

(d) voting for a director, or serving or acting as an institution-affiliated party.

2. This ORDER will become effective ten (10) days after its issuance. The provisions of this ORDER will remain effective and enforceable except to the extent that, and until such time as, any provision of this ORDER shall have been modified, terminated, suspended, or set aside by the FDIC.

Pursuant to delegated authority.

Dated this 24th day of October, 1994.

/s/ A. David Meadows
A. David Meadows
Associate Director
Division of Supervision

APPENDIX E

FDIC
Federal Deposit Insurance Corporation
Washington, DC 20429 Division of Supervision

October 24, 1994

CERTIFIED – RETURN RECEIPT REQUESTED

Mr. Michael C. Renner
412 W. Northpoint Drive
Peoria, Illinois 61614

Subject: In the Matter of
Michael C. Renner
Community Bank of Greater Peoria
East Peoria, Illinois
Docket No. FDIC-94-126e
Prohibition From Further Participation Proceeding

Dear Mr. Renner:

The Federal Deposit Insurance Corporation ("FDIC") has today adopted and approved the Stipulation and Consent to the Issuance of an Order of Prohibition From Further Participation ("Stipulation") which you entered into on July 12, 1994, with a representative of the FDIC. Also today, the FDIC issued an Order of Prohibition") against you. Copies of each of the aforementioned documents are enclose for your personal records.

The Stipulation was accepted and the Order of Prohibition was issued pursuant to section 8(e) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. section 1818(e) (1982), and section 8(j) of the Act, 12 U.S.C. section 1818(j) (1989).

Your attention is directed to section 8(j) of the Act, 12 U.S.C. section 1818(j) (1989), which imposes criminal penalties of up to five years imprisonment and a fine of up to $1,000,000 upon any person who is subject to an order in effect under section 8(e) and who, *without the prior written approval* of the appropriate Federal financial institution's regulatory agency, knowingly participates, directly or indirectly, in any manner, including by engaging in an activity specifically prohibited by section 8(e)(6) of the Act, 12 U.S.C. 1818(e)(6) (1989), in the conduct of the affairs of any insured depository institution, any institution treated as an insured bank or as a savings association, any insured credit union, any farm credit bank, or the Resolution Trust Corporation.

Sincerely,

/s/ A. David Meadows
A. David Meadows
Associate Director

Enclosures

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)
Plaintiff,	) Criminal No. 98-10021
vs.	) Peoria, Illinois
MICHAEL C. RENNER,	) September 24, 1998
Defendant.	)

HEARING ON PENDING MOTIONS

BEFORE:

HONORABLE MICHAEL M. MIHM
Chief United States District Judge

APPEARANCES:

BRADLEY W. MURPHY, ESQ.
GERARD BROST, ESQ.
Assistant United States Attorneys
216 Federal Building
Peoria, Illinois 61602
(Appeared on Behalf of the Government)

JOHN H. BISBEE, ESQ.
437 N. Lafayette Street
Macomb, Illinois 61455
(Appeared on Behalf of the Defendant)

Karen S. Hanna, C.S.R.
U.S. District Court Reporter
Central District of Illinois

Proceedings recorded by mechanical stenography, transcript produced by computer

* * *

[p. 16] MR. BISBEE: Okay. The dates that you have are March 18, 1998, January 7, 1997 and May 7, 1998. Thank you.

THE COURT: All right. The next motion is a double jeopardy motion. I have read all these pleadings and I think I am familiar with the cases. I would be happy to hear brief oral argument from both sides on this point. Mr. Bisbee?

MR. BISBEE: I would like to call Mr. Renner as a witness to the stand.

THE COURT: For what purpose?

MR. BISBEE: To ask his understandings concerning his execution of the stipulation which is addendum C to the –

THE COURT: Execution of what stipulation?

MR. BISBEE: The stipulation consenting to be debarred from banking.

THE COURT: Okay. Go ahead.

MR. BISBEE: Your Honor, I will make this Defendant's C for purposes of the –

THE COURT: I have it.

MICHAEL C. RENNER, having been first duly sworn, was examined and testified under oath as follows:

DIRECT EXAMINATION

BY MR. BISBEE:

Q State your name, please.

[p. 17] A Michael C. Renner.

Q Are you the defendant Michael Renner who is charged in this particular criminal action before this Court today?

A Yes, I am.

Q Were you formerly in the employ of Community National Bank of Peoria?

A Yes, Community Bank of Peoria.

Q Mr. Renner, I have handed you a document which has Defendant's C written on the side of it. Can you recognize that document?

A Yes.

Q Did you sign that document?

A Yes, I did.

Q Did you – did any language in the document cause you to have any understandings as to what the effect of the document was upon you?

A Yes.

Q Point out the language, please.

A The crux of the document was that I was debarred from ever participating in any kind of bank proceedings or being employed by a bank.

Q As you understood the document, did it indicate consequences if you attempted to bank again?

A Yes. It states that if I attempted to work at a bank, I would have criminal and civil penalties.

[p. 18] Q Was it your – did you have any further understanding as to what the effect of the document was in terms of further proceedings respecting your banking career or what had been your banking career?

A As far as my banking career?

Q Did you have any understanding as to what effect you execution of that exhibit had respecting any further legal proceedings?

A Well, the way I understood it, that I would have none.

Q You would have none?

A Unless I participated in banking, then I would have some.

MR. BISBEE: May I approach the witness one more time?

THE COURT: You may.

Q I'm going to hand you what has been marked as B. Can you identify that, Mr. Renner?

A Yes. It's an acknowledgment from the FDIC.

Q What is it? It is a letter?

A It's an acknowledgment about my prohibition from further participation in banking.

Q Does the document begin with "Dear Mr. Renner"?

A Yes.

Q Is it a letter to you?

A Yes, it is.

[p. 19] Q Did you have any understanding as to what the letter meant to you?

A It meant that I could never be a bank employee again, ever work in banking my entire life.

Q Did you have an understanding as to what would be the impact if you did engage in banking?

A That I would immediately be subject to civil and criminal penalties.

Q Criminal prosecution?

A Correct.

Q Did you understand that by your receipt of that – did you receive that letter after you signed the stipulation?

A Yes, I believe so. Yes.

Q Did you have any understanding upon your receipt of that letter as to what, if any, further legal proceedings would transpire against you?

A If I didn't sign this?

Q No. No. As a result of your receipt of that letter, along with your having signed this stipulation, did you have any understanding as to what, if any, further legal proceedings would take place against you?

A I just assumed there would not be by signing this.

Q Because you had –

A Cooperated and no longer able to work in banking.

Q And had been told that you were subject to criminal [p. 20] penalties if you did?

A If I did, right.

MR. BISBEE: No further questions.

THE COURT: Thank you. Mr. Murphy or Mr. Brost?

CROSS EXAMINATION

BY MR. MURPHY:

Q Mr. Renner, who were the parties to this negotiation where you gave your consent to be barred?

A If you're meaning the FDIC and myself and my attorney.

Q Okay. So you did have the advice of an attorney, correct?

A Yes.

Q Was that Mr. Grimsley who is here in court?

A Yes.

Q Did you have the understanding that if you did not consent to this that there was going to be some kind of a suit brought against you?

A Civil and criminal.

Q How did you get notice that this document called a consent was something that the FDIC wanted you to sign?

A I'm not sure I understand.

Q Well, was something sent to your attorney? Was something served on you? How did you get notice of this?

A To be honest with you, I don't know how I got it. I don't know if I got it directly to me or through my attorney, [p. 21] Gregg. I know that the stipulation in October, this Exhibit B, was I believe sent to me by registered mail.

Q And you got that letter and the stipulation about the same time, didn't you?

A No.

Q What is the date on that letter?

A Are you talking the one marked B?

Q Yes.

A October 24, 1994.

Q What is the date on the stipulation or the order that you received?

A If you're talking about Exhibit C, would that be the one? The other one is July 12, 1994.

Q That's the one that you signed and sent back, wasn't it?

A Right.

Q And then sometime in July of 1994, after you signed and sent that back, you received some information in October, didn't you, one of which was that notice?

A I believe that's what I just said.

Q Okay. And did you also receive a copy of an order of prohibition from further participation –

MR. BISBEE: We'll stipulate that he did, Your Honor.

Q And that's attached to defendant's – it's called "Addendum to Motions to Dismiss"?

[p. 22] MR. BISBEE: That's correct, Your Honor.

Q And have you seen that document, Mr. Renner? Are you aware that it is dated also October 24, 1994?

MR. BISBEE: We'll stipulate that it does and that he is aware of that and we object to the relevance.

THE COURT: The objection is overruled. The date is noted.

Q Were you aware, Mr. Renner, at the time of these goings-on in 1994 that the FDIC had instituted a civil suit against Mr. Dailey in late 1993?

MR. BISBEE: Objection, irrelevant.

THE COURT: Overruled.

A I had heard through the papers and through the news media.

Q And that was your only source of information about that?

A Correct.

MR. MURPHY: Thank you. That's all I have, Judge.

THE COURT: Any other questions?

RE-DIRECT EXAMINATION

BY MR. BISBEE:

Q Mr. Renner, do you have information that Mr. Murphy was privy to or had knowledge of the two exhibits you have in your hand, the stipulation and the letter from the FDIC telling you you would be subject to criminal prosecution if you went back into banking?

[p. 23] A Do I have knowledge that Mr. Murphy knew that?

Q Yes.

A Yes, I do.

Q What's the basis of your knowledge?

A During my grand jury testimony, he asked me, I think it was actually the very last question, this very same question, whether or not I had received anything on debarment from the FDIC.

Q The order of debarment which subjected you to criminal prosecution if you went back into banking, correct?

A Correct.

MR. BISBEE: Thank you. No further questions.

THE COURT: Thank you, sir. You may step down.

(Witness excused)

THE COURT: All right. Do you want to give your argument now?

MR. BISBEE: As the Government pointed out in its response, the law in this area has been subject to flux in the days since Halper was decided. The culminating decision being Hudson vs. United States last December. I think the Hudson decision goes right to the point we're talking about here, namely a debarment from banking under the statutory provisions having to do and governing the operation of the office of the comptroller of the currency and –

THE COURT: Hudson in fact dealt with the same

* * *

APPENDIX G
No. 96-976

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 78106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
PRINGLE & PRINGLE
4101 N. Classen Boulevard
Oklahoma City, OK 78118

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM*
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 78102
(405) 239-6781
Counsel for Petitioners

*Counsel of Record

December 17, 1996

* * *

APPENDIX I

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

IN THE MATTER OF JOHN HUDSON
FIRST NATIONAL BANK OF TIPTON, TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON,
HAMMON, OKLAHOMA

NOTICE OF INTENTION TO PROHIBIT
FURTHER PARTICIPATION

To: John Hudson, formerly of the First National Bank of Tipton, Tipton, Oklahoma, and the First National Bank of Hammon, Hammon, Oklahoma

TAKE NOTICE, that on the 2nd day of October, 1989, a hearing will commence at 10:00 a.m. in the United States Courthouse for the Western District of Oklahoma, Oklahoma City, Oklahoma, pursuant to the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818(e), (i) concerning the charges set forth herein to determine whether an Order should be issued against John Hudson (Respondent) prohibiting him from further participation, in any manner, in the conduct of the affairs of any insured-depository institution.

After examination and investigation into the affars [sic] of the First National Bank of Tipton, Tipton, Oklahoma (Tipton) and the First National Bank of Hammon, Hammon, Oklahoma (Hammon), the Comptroller of the

Currency of the United States of America (Comptroller) is of the opinion that Respondent has engaged in conduct or practice with respect to such banks which resulted in substantial financial loss or other damage, has evidenced his personal dishonesty and a willful and continuing disregard for such banks' safety and soundness and, in addition, has evidenced his unfitness to participate, in any manner, in the conduct of the affairs of any depository institution.

THEREFORE TAKE NOTICE of the Comptroller's intention to prohibit Respondent from further participation, in any manner, in the conduct of the affairs of any insured depository institution, pursuant to 12 U.S.C. § 1818(e), (i). In support of this Notice of Intention to Prohibit Further Participation (Notice), the Comptroller charges the following:

ARTICLE I

(1) Tipton and Hammon were national banking associations, chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended (12 U.S.C. § 1 *et seq.*).

(2) At all times relevant to the violations described below, Respondent was participating in the conduct of Tipton's and Hammon's affairs.

(3) Tipton and Hammon were declared insolvent by the Comptroller on September 3, 1987. The Comptroller has jurisdiction to issue this Notice under 12 U.S.C. § 1818(i)(3), which provides the Comptroller with authority to prohibit an individual who has become separated

from a national banking association from participating in the affairs of any depository institution.

ARTICLE II

(1) In the early 1980's, Respondent became the chairman of the board and controlling shareholder of Tipton and Hammon, as well as the First State Bank, Blanchard, Oklahoma (Blanchard), the First State Bank, Granite, Oklahoma (Granite) and the First State Bank, Willow, Oklahoma (Willow), all of which have failed. In July 1983, Respondent borrowed approximately $8.4 million from MBank, Dallas, Texas (MBank) to refinance his ownership of these institutions. The notes were secured by the banks' stock, as well as other collateral.

(2) In 1984, Tipton's and Hammon's boards of directors, including Respondent, executed formal agreements with the OCC. The formal agreements addressed problems in the lending area and required the correction and prevention of violations of law.

(3) On or about June 11, 1986, Tipton made a $25,010 loan to Respondent. On or about June 27, 1986, Tipton made a $75,010 loan to Respondent.

(4) On or about March 8, 1984, Hammon made a $25,000 loan to Respondent. On or about December 31, 1985, Hammon made a $75,020 loan to Respondent.

(5) The OCC's examinations of Tipton and Hammon in 1986 disclosed numerous insider violations involving Respondent, and areas of noncompliance with the formal agreements. The September 30, 1986 Report of Supervisory Activity of Tipton (1986 Tipton ROSA) cited the

bank for violations of 12 U.S.C. §§ 375a and 375b, and 12 C.F.R. § 31.2. The September 30, 1986 Report of Supervisory Activity of Hammon (1986 Hammon ROSA) cited the bank for violations of 12 U.S.C. § 375a and 12 C.F.R. § 31.2. The details of these violations are specifically set forth in the 1986 Tipton ROSA and the 1986 Hammon ROSA, which are incorporated herein by reference the same as if fully set forth.

(6) In 1986, Respondent defaulted on his bank stock loans at MBank. On August 8, 1986, Respondent resigned as a director of Tipton. Respondent also resigned as a director of Hammon during the September 30, 1986 examinations and was replaced by Jack B. Rackley. In October 1986, Rackley became Tipton's president.

(7) In the fall of 1986, Respondent contacted Claud Cypert, an Oklahoma businessman, to solicit his interest in representing a group of investors known as Macao Investment Company (Macao) who were allegedly interested in purchasing Respondent's bank stock notes at MBank. Macao's corporate records indicate that Respondent is Macao's president and a major shareholder. Respondent did not disclose the name of the group or his involvement in it to Cypert. In exchange for an option to purchase a five percent interest in Tipton and Hammon, and a bus to be donated to the Southern Nazarene University. Cypert agreed to represent the group in its dealings with MBank.

(8) On or about December 1, 1986, Respondent and MBank entered into a settlement agreement whereby MBank was given the right to sell the bank stock securing Respondent's notes. The settlement agreement provided

that after the sale of the bank stock, Respondent would be liable to MBank for any deficiency up to $2.75 million. The agreement further provided that Respondent would sell his interest in Blanchard to his father-in-law, Jack Marshall, and resign as a director of all the banks and their holding companies.

(9) In December 1986, MBank agreed to sell the Tipton and Hammon notes, with an underlying interest in the bank stock, to Cypert for $400,000. The deal was scheduled for closing on December 30, 1986 in Dallas.

(10) Between December 29 and 31, 1986, Tipton, Hammon and Blanchard made a total of eight unsecured loans to various nominee borrowers listed under subparagraphs (a)-(h) below. Except where noted, the proceeds of these loans, totaling $540,000, were deposited in an account of SKL, Inc. (SKL) at the Century National Bank, Oklahoma City, Oklahoma (Century), $400,000 of the proceeds were subsequently transferred by cashier's check to Macao. The remaining $140,000 was transferred back to Tipton, along with the proceeds of a $60,000 loan from Hammon to Hurley Financial Corporation (Hurley), to reimburse Tipton for $100,000 loans to Hurley and SKL which were not booked. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $20,000 loan from Tipton to Rackley on or about December 29, 1986;

(b) $90,000 loan from Tipton to SKL on or about December 30, 1986;

(c) $100,000 loan from Tipton to Hurley on or about December 30, 1986 (not booked);

(d) $100,000 loan from Tipton to SKL on or about December 30, 1986 (not booked);

(e) $90,000 loan from Hammon to Rackley on or about December 31, 1986 (only $40,000 was deposited in SKL's account at Century);

(f) $90,000 loan from Hammon to SKL on or about December 31, 1986;

(g) $60,000 loan from Hammon to Hurley on or about December 31, 1986 (proceeds were transferred back to Tipton, to partially reimburse the bank for the $100,000 loans to Hurley and SKL which were not booked);

(h) $100,000 loan from Blanchard to SKL on or about December 29, 1986.

(11) The loans set forth in pragraph (10) above were made on the basis of virtually no credit information or other documentation from the borrowers. Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the loans to himself. As directors, Rackley and Larry Baresel approved the loans at Tipton and Hammon, although Rackley abstained from voting on his own notes.

(12) On or about December 30, 1986, Baresel delivered a $400,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon and Blanchard set forth in paragraph (10) above. Cypert exchanged the cashier's check from Macao for his own $400,000 cashier's check payable to MBank and, on December 30, flew to Dallas with Baresel where they met with MBank officials. Cypert exchanged the $400,000 cashier's check for the Tipton and Hammon notes and underlying stock

interest. Shortly thereafter, Cypert assigned his interest in the notes and stock to Macao and gave the assignment, notes and stock to Baresel.

(13) In February 1987, MBank agreed to sell the Willow and Granite notes, with an underlying interest in the bank stock, some additional corporate stock and a real estate mortgage held as collateral, to Cypert for $750,000. The deal was scheduled for closing on February 27, 1987 in Dallas.

(14) Between February 23 and 27, 1987, Tipton, Hammon, Blanchard and the First National Bank of Del City, Del City, Oklahoma (Del City) made a total of ten unsecured loans to various borrowers listed under subparagraphs (a)-(j) below. Except where noted, the proceeds of these loans, totaling $520,000, were deposited in SKL's account at Century and subsequently transferred by cashier's check to Macao. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $60,000 loan from Tipton to Tom Lucas on or about February 23, 1987;

(b) $93,000 loan from Tipton to Jack Marshall on or about February 24, 1987 (only $65,351 was deposited in SKL's account at Century; the remaining $27,649 was used to make a payment on one of Respondent's loans at the Peoples State Bank, Claremore, Oklahoma (Peoples));

(c) $30,000 loan from Tipton to David Tuck on or about February 25, 1987;

(d) $92,000 loan from Hammon to Jack Marshall on or about February 24, 1987 (only $64,649 was deposited in SKL's account at Century; the

remaining $27,351 was used to make a payment on one of Respondent's loans at Peoples);

(e) $20,000 loan from Hammon to David Tuck on or about February 27, 1987;

(f) $10,000 loan from Hammon to Sharon Matthews on or about February 27, 1987;

(g) $40,000 loan from Blanchard to Tom Lucas on or about February 26, 1987;

(h) $60,000 loan from Blanchard to Rackley on or about February 26, 1987;

(i) $100,000 loan from Blanchard to Partridge Capital Corp., on or about February 26, 1987;

(j) $70,000 loan from Del City to SKL on or about February 25, 1987.

(15) In addition to the loans set forth in paragraph (14) above, Tipton made a $50,000 loan to H.H. Clifford on or about February 25, 1987. The proceeds of this loan were transferred to Executive Bank Management Services, Inc., a company controlled by Respondent. Respondent used the proceeds to purchase a $50,000 cashier's check payable to Macao.

(16) Tipton also made a $90,000 loan to Cypert on or about February 19, 1987, and Hammon made a $90,000 loan to Cypert on or about February 27, 1987.

(17) The loans set forth in paragraphs (14) through (16) above were made on the basis of virtually no credit information or other documentation from the borrowers. Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the $92,000 loan from Hammon to Jack Marshall. As directors, Rackley and

Baresel approved the loans at Tipton and Hammon, although Rackley abstained from voting on his own notes.

(18) On or about February 27, 1987, Baresel delivered a $570,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon, Blanchard and Del City set forth in paragraphs (14) and (15) above. Cypert exchanged the $570,000 cashier's check and the proceeds of the two $90,000 loans from Tipton and Hammon for a $750,000 cashier's check payable to MBank. On February 27, 1987, Cypert and Baresel flew to Dallas where they again met with MBank officials. Cypert exchanged the $750,000 cashier's check for the Willow and Granite notes, underlying stock interests, and assignment of the real estate mortgage. At the request of Respondent and Baresel, Cypert reassigned the real estate mortgage to Blanchard where it was used to provide security for one of Respondent's loans.

(19) Respondent directly benefited from the nominee loans at Tipton and Hammon that were used to purchase his bank stock notes at MBank. Respondent also directly benefited from the portions of the Jack Marshall loans from Tipton and Hammon that were used to make a payment on one of his loans at Peoples. Those loans are therefore attributable to him for lending limit purposes pursuant to 12 C.F.R. § 32.5(a)(1). At Tipton, the $20,000 advance to Rackley on December 29, 1986, when combined with Respondent's existing advances, first caused the line to exceed the bank's legal lending limit set forth at 12 U.S.C. § 84(a)(1). Total advances attributable to Respondent equaled $533,020 at Tipton, which exceeded

the lending limit by $437,509. At Hammon, the $60,000 advance to Hurley and the $90,000 advances to SKL and Rackley on December 31, 1986, when combined with Respondent's existing advances, first caused the line to exceed the bank's lending limit. Total advances attributable to Respondent equaled $502,020 at Hammon, which exceeded the lending limit by $407,792.

(20) The nominee loans at Tipton and Hammon are also attributable to Respondent for purposes of 12 U.S.C. § 375b, and 12 C.F.R. §§ 31.2(b) and 215.4(b), pursuant to 12 U.S.C. §§ 31.3 and 215.3(f). At Tipton, the loans to Clifford, Cypert, Lucas, Marshall, SKL and Tuck were made at a time when Respondent's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i). At Hammon, the loans to Cypert, Marshall, Matthews and Tuck were made at a time when Respondent's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i).

(21) The violations set forth in paragraphs (19) and (20) above were uncorrected at the close of the May 31, 1987 examination of Tipton and the June 30, 1987 examination of Hammon. The violations resulted in losses of approximately $456,000 at Tipton and $437,000 at Hammon. The losses contributed to the banks' failures on September 3, 1987. Further details of the violations are specifically set forth in the Report of Supervisory Activity of Tipton dated May 31, 1987 (1987 Tipton ROSA) and the Report of Supervisory Activity of Hammon dated June

30, 1987 (1987 Hammon ROSA). The 1987 Tipton ROSA and 1987 Hammon ROSA are incorporated herein by reference the same as if fully set forth.

ARTICLE III

(1) The actions of Respondent described in Article II, paragraphs (1) through (21) above demonstrate that Respondent has engaged in conduct or practice with respect to Tipton and Hammon which resulted in substantial financial loss or other damage, has evidenced his personal dishonesty and a willful and continuing disregard for such banks' safety and soundness and, in addition, has evidenced his unfitness to participate, in any manner, in the conduct of the affairs of any insured depository institution.

THEREFORE, Respondent is directed to file an answer in writing to the charges contained herein with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219, within twenty (20) days from the date of service of this Notice, in accordance with 12 C.F.R. Part 19.

Pursuant to 12 U.S.C. § 1818(h)(1) and 12 C.F.R. § 19.10(c), the Comptroller may, in his discretion, order that a public hearing be held if he determines that it is necessary to protect the public interest. Respondent is hereby afforded an opportunity to submit his views as to whether a public hearing would be in the public interest in this case.

WITNESS, my hand on behalf of the Office of the Comptroller of the Currency, given at Washington, D.C. the 31st day of August, 1989.

/s/ Dean S. Marriott
DEAN S. MARRIOTT
Senior Deputy Comptroller
for Bank Supervision

APPENDIX H

No. 96-976

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 78106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
PRINGLE & PRINGLE
4101 N. Classen Boulevard
Oklahoma City, OK 78118

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM*
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 78102
(405) 239-6781

Counsel for Petitioners

*Counsel of Record

December 17, 1996

* * *

APPENDIX L

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-89-05
AA-EC-89-117

IN THE MATTER OF JOHN HUDSON
FIRST NATIONAL BANK OF TIPTON (INSOLVENT)
TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON (INSOLVENT)
HAMMON, OKLAHOMA

STIPULATION AND CONSENT ORDER

WHEREAS, the Comptroller of the Currency of the United States of America (Comptroller) has initiated civil money penalty proceedings against John Hudson (Respondent) pursuant to 12 U.S.C. §§ 93(b), 504(c) through the issuance of a Notice of Assessment of a Civil Money Penalty (Notice), dated February 13, 1989; and

WHEREAS, the Comptroller has initiated prohibition proceedings against Respondent pursuant to 12 U.S.C. § 1818(e) (as amended) through the issuance of a Notice of Intention to Prohibit Further Participation (Prohibition Notice), dated August 31, 1989; and

WHEREAS, in the interest of cooperation and the avoidance of further proceedings with respect to the above matters, the Comptroller and Respondent wish to enter into this Stipulation and Consent Order;

NOW, THEREFORE, in consideration of the above premises, it is stipulated by and between the Comptroller, through his duly authorized representative, and Respondent that:

ARTICLE I

(1) Respondent hereby consents to a civil money penalty the amount of sixteen thousand five hundred dollars ($16,500). Said penalty shall be payable in five installments, as follows: two thousand five hundred dollars ($2,500) upon Respondent's execution of this document, three thousand five hundred dollars ($3,500) within one year of Respondent's execution of this document, three thousand five hundred dollars ($3,500) within two years of Respondent's execution of this document, three thousand five hundred dollars ($3,500) within three years of Respondent's execution of this document, three thousand five hundred dollars ($3,500) within four years of Respondent's execution of this document. Said penalty shall be payable to the Treasury of the United States and shall be delivered to the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219.

(2) In the event Respondent fails to make any payment within the periods stated in paragraph (1) above, Respondent will be given written notice that such payment is lacking. Respondent will then have ten days from his receipt of such written notice in which to tender payment. If payment is not tendered within that ten-day period, the entire unpaid balance of said penalty shall become due and payable immediately.

(3) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. §§ 93, 504, 1818(i) (as amended).

ARTICLE II

(1) With respect to the institutions and agencies set forth in paragraph (2) of this Article, Respondent hereby agrees that he shall not:

(a) participate in any manner in the conduct of their affairs;

(b) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights;

(c) vote for a director, or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u) (as amended); or

(d) violate any voting agreement previously approved by the "appropriate Federal banking agency," as defined in 12 U.S.C. § 1813(q) (as amended);

(2) The prohibitions in paragraph (1) of this Article apply to the following institutions and agencies:

(a) any insured depository institution, as defined in 12 U.S.C. § 1813(C);

(b) any institution treated as an insured bank under 12 U.S.C. § 1818(b)(3), (b)(4), or as a savings association under 12 U.S.C. § 1818(b)(8) (as amended);

(c) any insured credit union under the Federal Credit Union Act;

(d) any institution chartered under the Farm Credit Act of 1971;

(e) any appropriate Federal depository institution regulatory agency;

(f) the Federal Housing Finance Board and any Federal home loan bank;

(g) the Resolution Trust Corporation.

(3) The prohibitions of paragraphs (1) and (2) of this Article shall cease to apply with respect to a particular institution if Respondent obtains the prior written consent of both the Comptroller and the institution's "appropriate Federal financial institutions regulatory agency," as defined in 12 U.S.C. § 1818(e)(7)(D) (as amended).

(4) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. § 1818(e), (i), (j), and (k) (as amended).

ARTICLE III

(1) Respondent hereby waives:

(a) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. §§ 93, 504, 1818 and 12 C.F.R. Part 19;

(b) all rights to seek judicial review of this Order;

(c) all rights in any way to contest the validity of this Order; and

(d) any and all claims for fees or expenses related to this Order against the Comptroller, or any of his agents, whether arising under common law or under their terms of any statute, including, but not limited to, the Equal access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412.

ARTICLE IV

(1) The Comptroller hereby agrees that this Stipulation and Consent Order does not constitute an admission of Respondent to any of the charges contained in either the Notice or the Prohibition Notice, nor shall any court of law construe it to constitute any such admission, nor shall any court of law use it as evidence of any such admission.

ARTICLE V

(1) The Comptroller hereby agrees that the execution of this Stipulation and Consent Order settles all claims the Comptroller may have against Respondent for violations alleged in the Notice, Prohibition Notice, or any Report of Examination of the First National Bank of Tipton or the First National Bank of Hammon. The Comptroller also hereby agrees not to institute any additional enforcement actions against Respondent for the violations alleged in the Notice, Prohibition Notice, or any Report of Examination of the First National Bank of Tipton or the First National Bank of Hammon. Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein

constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representative of the United States, or agencies thereof, to bring other actions deemed appropriate.

IN TESTIMONY WHEREOF, the undersigned have hereunto set their hands.

Date 11-27-89 /s/ Robert J. Hermann
ROBERT J. HERMANN
Senior Deputy Comptroller
for Bank Supervision

Date 10-26-89 /s/ John Hudson
JOHN HUDSON